

CITY OF TIGARD, OREGON
TIGARD CITY COUNCIL
RESOLUTION NO. 06- 15

A RESOLUTION AND FINAL ORDER SUPPLEMENTING RESOLUTION 06-09 APPROVING THE ASH CREEK ESTATES SUBDIVISION (SUBDIVISION (SUB) 2003-00010/PLANNED DEVELOPMENT REVIEW (PDR) 2003-00004/ZONE CHANGE (ZON) 2003-00003/SENSITIVE LANDS REVIEW (SLR) 2003-00005/ADJUSTMENT (VAR) 2003-00036/ADJUSTMENT (VAR) 2003-00037) – ON REMAND FROM LUBA; AND ADOPTING ADDITIONAL FINDINGS AND IMPOSING AN ADDITIONAL CONDITION.

WHEREAS, the City Council adopted Resolution 06-09 at its February 28, 2006 meeting relating to the Ash Creek Subdivision land use but continued the hearing to adopt additional findings;

WHEREAS, Resolution 06-09 accurately sets forth the procedural history of this matter;

WHEREAS, the Council has considered the proposed additional findings and condition proposed by staff;

NOW, THEREFORE, BE IT RESOLVED by the Tigard City Council that:

SECTION 1: Resolution 06-09 and all findings and conditions included or incorporated into Resolution 06-09 remain in effect. This Resolution supplements, but does not otherwise amend Resolution 06-09. Resolution 06-09 and this resolution constitute the final decision of the City.

SECTION 2: The Council adopts the findings in the document entitled "ADDITIONAL FINDINGS AND CONDITION (MARCH 2006) ASH CREEK ESTATES SUBDIVISION SUB2003-00010/ZON2003-00003/PDR2003-00004/SLR2003-00005/VAR2003-00036-0037" attached hereto as Exhibit A, as additional findings, and imposes the additional condition of approval included in that document.

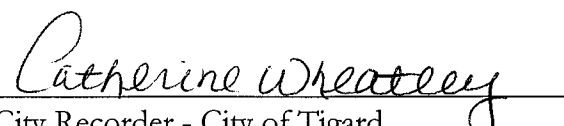
SECTION 3: This resolution is effective when notice of the decision is mailed.

PASSED: This 28th day of March 2006.



Mayor - City of Tigard

ATTEST:



City Recorder - City of Tigard

ADDITIONAL FINDINGS AND CONDITION (MARCH 2006)
ASH CREEK ESTATES SUBDIVISION
SUB2003-00010/ZON2003-00003/PDR2003-00004/SLR2003-00005/VAR2003-
00036/VAR2003-00037

1. The Tigard City Council heard testimony on this matter at its February 28, 2006 meeting and closed the hearing. The Council adopted Resolution 06-09 approving the application with the findings and conditions recommended by staff, but also decided to continue the matter to March 28, 2006, for the adoption of additional findings and conditions.
2. This matter is on remand a second time from the Land Use Board of Appeals. The issue on this remand is limited to whether CDC 18.350.100B.3.a.1 is met as to 23 trees specified in the LUBA decision.

FINDINGS IN RESPONSE TO COMMENTS

2. The City received written comments from Bob Storer and oral and written comments from John Frewing.

Response to Comments from Bob Storer

3. Mr. Storer stated that he was not convinced that the developer or the contractors will comply with all of the conditions of approval and questions City monitoring of the proposed project. This comment is not relevant to the issue on remand. There is always a risk of non-compliance with conditions of approval, but the City does monitor development and has the authority to stop work if conditions are not complied with. The risk of non-compliance is not a basis for denial.
4. Mr. Storer argued that the standard is not being met because trees other than the 23 trees are being removed. This argument is outside the scope of the issue before the Council. Furthermore, LUBA has already affirmed the City's decision that the removal of other trees is consistent with the standard. This issue has already been decided and is no longer subject to challenge. In LUBA Case No. 2005-042, LUBA considered the tree plan that the applicant submitted to the City on the first remand. That plan illustrated the trees that would be preserved and the trees that would be removed. LUBA concluded that except for the 23 trees specifically identified, the tree plan complies with the City's requirement. LUBA's decision was affirmed by the Court of Appeals. Any argument concerning any trees other than the 23 trees identified by LUBA is outside the scope of the remand.
5. Mr. Storer argues that just because the development meets all standards does not mean that the application should be approved. In a quasi-judicial proceeding, however, the City is required to approve applications that meet all applicable criteria and may not

deny an application for reasons unrelated to applicable criteria. ORS 197.522.

6. Mr. Storer argues that the development should not be approved until all local, state and federal permits and other associated approvals have been obtained. Mr. Storer cites no authority for this proposition, and the argument is outside the scope of the remand. While the applicant must obtain all required permits, obtaining the permits does not need to occur prior to land use approval; it is sufficient that the approvals be obtained prior to the work.
7. Mr. Storer asks the Council to adopt more stringent standards. While the Council may adopt more stringent standards in the future, it must consider this application under the standards in effect at the time the application was filed. Adoption of more stringent standards is irrelevant to this application and decision.

Response to Comments from John Frewing

8. Mr. Frewing comments that although the map associated with the tree plan shows that the 23 trees will be protected, some of the text of the plan indicates they will be removed. The Council finds that the map controls over the text and that the 23 trees at issue will be protected. To ensure protection, the Council is adopting an additional condition of approval specifically requiring the protection of those 23 trees. Compliance with the condition is feasible – the applicant has indicated that those trees will be protected during construction.
9. Mr. Frewing has argued that some of the 23 trees have not been identified by species. Mr. Frewing made a similar argument to LUBA in the last remand and did not prevail. LUBA's decision was affirmed by the Court of Appeals. This issue has been decided against Mr. Frewing and he cannot raise it again. This argument is outside the scope of the remand. It is clear from the tree plan which trees are to be protected, and that is sufficient to satisfy the CDC 18.350.100B.3.a.1 standard.
10. Mr. Frewing argues that tree protection standards should be modified to be consistent with standards that have evolved and improved since the tree protection plan was originally prepared. This argument is outside the scope of the remand. Furthermore, the application is to be judged by the standards in effect at the time the application was first submitted – ORS 227.178(3)(a). Also, Mr. Frewing did not identify what changes in tree protection standards have occurred and did not provide any information that any changes in tree protection standards have become applicable standards or criteria in a land use application.
11. Mr. Frewing asked the City to require the applicant to confirm the purpose of fencing shown on the 9/22/05 drawing. This is outside the scope of the remand and not required by any applicable standard.

12. Mr. Frewing makes various arguments relating to trees other than the 23 trees designated for protection. These arguments are outside the scope of the remand. Whether any additional trees should be protected or whether protection for other trees shown to be protected is outside the scope of the remand.
13. Mr. Frewing argues that the City should expand the remand beyond the narrow issue remanded by LUBA. While the City has the authority to expand the scope of the remand, it is solely within the City's discretion whether to expand the scope beyond the issue remanded by LUBA. The City Council chose to limit the remand to the issue remanded by LUBA and that decision was within the scope of the City's discretion. LUBA explained the scope of the remand as follows: "On remand the city must explain why it is not possible to preserve the trees identified in footnote 16, or require that the tree plan be amended to preserve those trees." That is the only issue on remand, and the applicant has amended the tree plan to preserve those trees.
14. Mr. Frewing raised questions as to when the final decision needs to be made on remand. The applicant has agreed to an extension of time to make the decision, so this issue is moot.
15. Mr. Frewing also argued that ex parte contacts had occurred and that one or more Council members were biased. First, Mr. Frewing argued that there had been ex parte contact between one or more Council members and the developer relating to the donation of property from the developer to the City for park purposes. All Council members stated that they had not had any contacts with the applicant/developer and the City Manager stated that all contacts had been at the staff level. Representatives of the applicant also testified that there had been no ex parte contacts between the applicant or anyone associated with the applicant and any Council member regarding the property. The Council finds that there were no ex parte contacts as alleged by Mr. Frewing. Mr. Frewing based his allegations of ex parte contacts on a newspaper article in *The Oregonian* by Rick Bella. Mayor Dirksen stated that he had a discussion with Mr. Bella, but that Mr. Bella did not accurately report the Mayor's statements. There is no credible evidence of undisclosed ex parte contacts.
16. Mr. Frewing claims that the Council is biased because it is attempting to obtain open space for the City from the applicant. The City Manager stated that there have been discussions between staff and the applicant on this issue, but that no Council member was involved or informed of the discussions. All Council members stated that potential land acquisition by the City would play no role in their evaluation of the case and that they could judge the land use matter before them based on the facts and criteria. All members denied any bias. The Council finds that all Council members based their decisions on the facts presented in the land use process and applying the applicable criteria and standards, without other considerations. Given the narrow scope of remand and the revised tree plan showing protection of all 23 trees that were the subject of the remand, the only possible decision was approval.

ADDITIONAL CONDITION

Applicant shall not remove or damage and shall preserve the 23 trees specified in footnote 16 of the LUBA decision in accord with Conditions 55 through 58.